Petition

No. 81-275

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In The

Supreme Court of the United States

October Term, 1981

Refined Metals Corp.,

Petitioner,

v.

Luther C. Underhill,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. What is the proper standard by which a jury is to be instructed to determine whether an employer's decision to take adverse action against an employee is a violation of the Age Discrimination in Employment Act where a *prima facie* showing of age discrimination has been rebutted by "reasonable factors other than age".

2. Whether the jury interrogatories formulated from the Sixth Circuit's opinion in *Laugesen v. Anaconda* accurately reflect the intent of the Age Discrimination Employment Act in clear and understandable language.

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No. _____

Refined Metals Corp.,
Petitioner,

v.

Luther C. Underhill,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Refined Metals Corp., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 24, 1981.

OPINIONS BELOW

The decision and order of the United States District Court for the Western District of Tennessee is unreported, but is reproduced herein in the Appendix (App. at A.5 - A.8). The decision and order of the United States Court of Appeals for the Sixth Circuit, dated April 24, 1981, is not reported as yet and is

reproduced herein in the Appendix (App. at A.2 - A.4).

JURISDICTION

The opinion of the Court of Appeals was entered on April 24, 1981 (App. at A.2 - A.4). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254 (1) (1976).

STATUTE INVOLVED

This case involves interpretation and application of Section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623 (hereinafter referred to as the "ADEA"). This provision states in pertinent part:

> § 623. Prohibition of age discrimination
>
> (a) Employer practices. It shall be unlawful for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.
>
> *****
>
> (f) Lawful practices; Age an occupational qualification; Other reasonable factors; Seniority system; Employee benefit plans; Discharge or discipline for good cause.
>
> It shall not be unlawful for an employer, employment agency, or labor organization --

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

*****

(3) to discharge or otherwise discipline an individual for good cause.

STATEMENT OF THE CASE

Respondent Luther Underhill is an employee of Petitioner, Refined Metals Corp.[1] On August 21, 1976, Petitioner reassigned Respondent from his position as Director of Safety and Personnel to Billing and Scale Clerk. In response to this reassignment, Respondent brought suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621 - 634 (hereinafter referred to as the "ADEA"), alleging that Petitioner's decision had violated the ADEA as it had been motivated by age discrimination. Jurisdiction was asserted under 28 U.S.C. § 1331. During the trial, Petitioner denied that age had been a factor in its decision, and presented numerous witnesses to sustain its position that Respondent's inability to perform his job was the factor behind the reassignment.

Following the submission of all evidence, both parties submitted special requests for jury instructions. One of Petitioner's requested jury instructions contained the following passage: "In passing the law, Congress intended to insure that age is not a determining factor in making any decision regarding conditions

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[1] *See* App. at A.20

of employment." App. at A.15. The District Court Judge[2] rejected Petitioner's proposed instructions on the grounds that it would be "a little stronger than what Congress called for . . . ." App. at A.18. Instead, in the special interrogatories to the jury, Judge Brown relied upon the Sixth Circuit Court of Appeals' opinion in *Laugesen v. Anaconda Company,* 510 F.2d 307 (6th Cir. 1975) and formulated the test as follows:

> **Interrogatory No. 2:** Was the age of plaintiff a factor and did it, in fact, make a difference in the decision not to retain plaintiff in his position as director of personnel and safety after August 21, 1976?
>
> **Interrogatory No. 4:** Did the defendant act wilfully when it considered plaintiff's age as a factor and allowed it, in fact, to make a difference in its decision to demote plaintiff on August 21, 1976?

The Judge refused Petitioner's request to amend interrogatory number two to indicate that age needed to be a "significant" or "determining" factor. The jury ultimately answered interrogatory number two in the affirmative and interrogatory number four in the negative.

Petitioner appealed to the Sixth Circuit Court of Appeals challenging, *inter alia,* the trial court's formulation of the standard of causation as contained in the interrogatories and instructions to the jury. Petitioner argued that the trial court erred by failing to inform the jury that where an employer was motivated by both legitimate business decisions that were not a pretext for discrimination and impermissible considerations (the "mixed-motives" situation) a violation of the ADEA would arise only if age was a *determinative* factor in the sense that *but for* the Petitioner's improper consideration of age, the adversely affected employee would not have been demoted.

Petitioner contended that the trial court's formulation of the

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[2] The Honorable Bailey Brown, now a member of the Sixth Circuit Court of Appeals.

motive test created a lower threshold for liability than that which Congress and various circuit courts have prescribed.

The Sixth Circuit panel[3] noted, however, that the trial court had derived the wording in its interrogatory from the Sixth Circuit's previous opinion in *Laugesen*[4] and accordingly, affirmed the trial court's judgment.

The Sixth Circuit asserted, nevertheless, that it expressed "no view whether a 'but for' standard of causation is appropriate" in an ADEA action. App. at A.4.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's Opinion Conflicts With Those of Other Circuits as to the Proper Standard to Be Applied by the Jury in Determining Whether There Is a Violation of the ADEA.

The lower courts have uniformly agreed that a plaintiff in an ADEA action bears the burden of persuasion by a preponderance of the evidence that he or she has been discriminated against "because of age." The courts have also generally agreed that such a requirement means that the plaintiff must prove that age was a "determinative factor" in the employer's allegedly discriminatory decision. *Cova v. Coca Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 960 (8th Cir. 1978); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-13 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980); *Carter v. Maloney Trucking & Storage, Inc.* 631 F.2d 40, 42 (5th Cir. 1980); *Cf. Smithers v. Bailar*, 629 F.2d 892, 896 (3d Cir. 1980) (applying the determinative factor test in the context of a Title VII complaint).

Yet, the courts have had difficulty in applying the deter-

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[3]Circuit Judges Engel, Kennedy and Martin.

[4]This opinion was authored by Judge Engel, the presiding judge of Petitioner's panel.

minative factor test in the "mixed-motives" context, i.e., a situation where an employer's decision included consideration of both permissible and impermissible factors. This difficulty in application has engendered the formulation of difficult and often contradictory approaches. Particular conflict has arisen as trial courts elaborate on the meaning of the "determinative factor" standard in the process of giving instructions and interrogatories to their juries. Courts have not agreed as to what wording in an instruction or interrogatory conveys the appropriate definition of "a determinative factor." *See Olsen v. Southern Pacific Transportation Co.*, 480 F. Supp. 773, 779 n.4 (N.D. Cal. 1979).

Several courts have sanctioned relatively low thresholds for proving age was a determinative factor. In *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), the Second Circuit Court of Appeals held that in light of the overall instruction, the trial court did not err by asking simply if age was "one reason" for the employer's refusal to appoint the plaintiff to a permanent position. *Id.* at 1035. Drawing upon *Laugesen*, the Tenth Circuit Court of Appeals in *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1978), noted "we recognize that the plaintiff is entitled to recover if *one factor* in the decision was age." *Id.* at 974 (emphasis added). *Accord, Coates v. National Cash Register Co.*, 433 F. Supp. 655, 660-61 n.1 (W.D. Va. 1977) (implementing the "one factor" test). And in the case at bar, the Sixth Circuit Court of Appeals addressed the sufficiency of the trial court's interrogatories and instructions and found "no meaningful distinction between an instruction requiring age to be a 'determining' factor and one which requires age to 'make a difference.'" App. at A.4.

Other courts have instituted a much higher threshold for establishing an ADEA claim. In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit Court of Appeals analyzed the adequacy of an instruction similar to that given by the trial court in the case at bar. The trial court in *Loeb* instructed the jury that a violation of the ADEA would arise if age was "one factor . . . [that] made a difference." 600 F.2d at

1009. The First Circuit rejected this formulation of the determinative factor test, noting:

> Plaintiff's brief apparently concedes that he was required to prove that age was the determining factor, but argues that this was conveyed by instructing that age had to have "made a difference." We agree with defendants, however, that the court's statement was inadequate to convey to the jury the legal standard it should follow. *To find that age was a factor that affected the decision is not equivalent to finding that age was a determinative factor, yet proof that it was a determinative factor is, as both parties recognize, essential to recovery under the ADEA.*

Id. (emphasis added). The court's view is clear; showing that age was a factor that made a difference is not sufficient to prove age was a determining factor. Rather, to meet the threshold contemplated in the Act, a plaintiff must prove that *but for* the defendant's consideration of age, the defendant's adverse employment decision would not have been made. *Id.*

The Fourth Circuit Court of Appeals recently endorsed this view in *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981). In so doing, it held that a jury instruction requiring anything less than "but-for" causation as a precondition for finding an ADEA violation would fail to establish that age was, in fact, a determinative factor. *Id.* at 1112. *See also Kephart v Institute of Gas Technology*, 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1418 (1981). *Cf. McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976) (noting that in employment discrimination cases brought under Title VII, proof of discrimination must be shown by "but-for" causation); *Monteiro vs. Poole Silver Co.*, 615 F.2d 4, 9 (1st Cir. 1980) (holding in a Title VII case that in the mixed-motives situation a finding that discrimination was "one of the factors" falls short of meeting the determinative factor test).

II.

An Interrogatory or Instruction to a Jury That States That a Violation of the ADEA Occurs Where Age Is "A Factor Which In Fact Makes A Difference" Fails to Convey the Correct Standard in Language a Jury Can Understand.

A. *Congress intended for an ADEA violation to arise only where, "out for" age, the employer would not have released, demoted or failed to hire the employee.*

While the ADEA makes no mention of a determinative factor standard, circuit courts, as well as district courts, in interpreting the Act have predominately held that such a test is clearly indicated by the legislative history. Nevertheless, as noted *supra*, courts have disagreed as to how the determinative factor standard should be applied. The legislative history reveals that Congress intended to erect a high threshold for claims arising in the mixed-motives context. As the Senate Report accompanying the ADEA states: "The purpose of this legislation, simply stated, is to insure that age, within the limits prescribed herein, is not a determining factor in the refusal to hire." S. Rep. No. 723, 90th Cong., 1st Sess. 7 (1967). The floor manager of the bill in the Senate noted that "this bill prohibits discrimination in hiring and firing workers *solely* because they are over forty and under sixty-five." 113 Cong. Rec. 31252 (1967) (emphasis added). The debate in the House of Representatives suggests that the ADEA was designed to provide relief only where the individual is "deprived of job *solely* on the basis of age." 113 Cong. Rec. 3447 (1967) (statement of Congressman Dent) (emphasis added). Although the Act was subsequently amended, Congress did not retreat from its position that the Act was designed to insure that an individual "with the ability and desire to work should not be denied that opportunity *solely because of age.*" S. Rep. No. 493, 95th Cong., 2d Sess. 3 (1978) *reprinted in [1978] U.S. Code Cong. & Ad. News 504, 506* (emphasis added).

The Secretary of Labor and the Equal Employment Opportunity Commission have followed the determinative factor standard in promulgating regulations:

> It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a *determining factor* in making any decision regarding the hiring, dismissal, promotion, or any other term, condition or privilege of employment of an individual.

29 C.F.R. § 860.103(c) (1980). Though not controlling, such an interpretation by the regulating body is highly probative of the true meaning of the ADEA. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980).

Congress intended that business management would be allowed to make non-pretextual employment decisions affecting persons within the protected class. It is permissible for employers to make adverse employment decisions based on reasonable factors other than age [29 USC § 623 (f) (1)] or for good cause [29 USC § 623 (f) (3)]. Unlike the bona fide occupational qualification exception, which is essentially an affirmative defense, good cause and differentiating factors other than age are not "burden-shifting" exceptions, but are vitiations of the cause of action. *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, *rehearing and rehearing en banc denied*, 582 F.2d 966 (5th Cir. 1978). Where the employer offers evidence that the employment action was made in good faith and as a reasonable exercise of business judgment, the plantiff employee must establish that the reasons advanced were pretexts for prohibited conduct. *Kephart v. Institute of Gas Technology*, 630 F.2d at 1223; *Havelick v. Julius Wile Sons & Co.*, 445 F. Supp. 919 (S.D.N.Y. 1978); *Randlett v. Owens - Illinois*, 419 F. Supp. 103 (N.D. Tex. 1976).

The instructions given in this case do not convey the defenses of § 623(f) and are, in fact, devoid of any indication of Congressional intent to protect management decisions made in good faith or based on legitimate business factors.

The instructions similarly do not appropriately convey the determinative factor standard to the jury. Numerous courts interpreting the legislative history and agency interpretations have held that the "determinative factor" notion arises only where "but for" the employer's motive to discriminate on the basis of age, the employee would not have been discharged or demoted. *Loeb v. Textron, Inc.*, 600 F.2d at 1019; *Spagnuolo v. Whirlpool Corp.*, 641 F.2d at 1112; *Kephart v. Institute of Gas Technology*, 630 F.2d at 1223.

The "but-for" causation standard has been cited by this Court as providing the appropriate test for motivation where an employer's decision to dismiss a teacher was based on both permissible and impermissible motives. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). In *Givhan*, this Court held that only if the trial court were to find that the teacher "would have been hired *but for* her criticism" would she be able to prevail on her claim. *Id.* at 417. (emphasis in original). This Court has also endorsed the "but for" test in mixed-motive employment discrimination cases arising under Title VII. *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. at 282 n.10.

State courts construing statues containing language similar to the "because of age" passage found in the ADEA have similarly invoked a "but-for" test to show causality. *De Leeuw v. Department of Industry, Labor & Human Relations*, 71 Wis.2d 446, 450, 238 N.W.2d 706, 709 (1976). *See also* Williams, *The Labor Dispute Disqualifications -- A Primer and Some Problems*, 8 Vand. L. Rev. 338, 344 (1955).

The conclusion to be drawn from this is that the "but-for" test serves as the most appropriate elaboration of the determinative factor test, which, in turn clarifies the language of the statute. This Court should instruct the lower courts to adopt

the "but-for" test and end the varied constructions placed upon the determinative factor standard by the trial courts.[5]

B. *The "factor which in fact makes a difference" test is not equivalent to the determinative factor or "but-for" test and, thus, is inappropriate for use in interrogatories and instructions to the jury.*

The Sixth Circuit Court of Appeals below found no difference between the determinative factor or "but for" test and the test invoked by the trial court. App. at A.4. The decisions of at least two Circuit Courts suggest that this view is erroneous and that, in fact, the threshold for proving a violation under the test used by the trial court is significantly lower than that arising under the "but-for" test. *Loeb v. Textron, Inc.*, 600 F.2d at 1019; *Spagnuolo v. Whirlpool Corp.*, 641 F.2d at 1112. The trial court below acknowledged the difference between the determining factor standard and the test it proposed in its interrogatory: In rejecting the use of Petitioner's proposed Instruction No. 5, which had included the "determining factor" language, the trial court specifically noted that it would be "a little stronger" than language the court ultimately used. App. at A.18.

The Court has recognized similar distinctions in a number of related employment discrimination cases. In *Givhan*, the Court found that even where a constitutionally protected right was found to be the "primary" reason for the employer's failure to rehire the plaintiff, this was not equivalent to a finding that the employee would have been rehired *but for* the exercise of her rights. *Id.* at 417. Similarly, this Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), refused to find a violation of an employee's constitutional rights where protected conduct played a "substantial part" in the employer's

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[5]While Petitioner did not specifically request the "but for" language at trial, it did point out the inadequacies of the trial court's interrogatory and instructions to the jury and suggested certain revisions. App. at A.10 - A.13 and A.17 - A.19. Thus, the trial court's failure to use the appropriate determinative factor or "but-for" test is ripe for review. St. Paul Fire & Marine Ins. Co. v. Bachmann, 285 U.S. 112, 118-19 (1932); Gradsky v. Sperry Rand Corp., 489 F.2d 502, 503 (6th Cir. 1973).

decision not to renew the plaintiff's employment contract. *Id.* at 285. *See Womack v. Munson*, 619 F.2d 1292, 1297 (holding that "[e]ven if protected conduct is shown to be a substantial factor in the termination decision, the employer may not be liable if the discharge would have taken place in the absence of the protected activity"), *rehearing and rehearing en banc denied*, 619 F.2d 1292 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 1513 (1981); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1979) (noting that in Title VII cases, "impact alone is not determinative").

The clear theme emerging from these cases was best summed up by this Court in *Mt. Healthy*:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the district court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred.

429 U.S. at 285. The problem with adopting a low threshold in ADEA cases is of the very same nature: a rule of causation in ADEA cases that establishes liability where age was merely a "factor which makes a difference" would place an employee in a better position than other workers merely because that employee falls within the protected age group. As in the *Mt. Healthy* situation, an employee between the ages of forty and seventy years may, under a low measure of causation, be able to elude dismissal or demotion even if the same decision to

dismiss or demote would have been reached had age not been a factor. By establishing a higher threshold, the "but-for" standard prevents the ADEA from being invoked to shield incompetent workers from the natural consequences of their actions. In short, use of the "but-for" standard ensures that the true purpose of the Act -- equality in treatment -- will not be interpretted as a mandate for preferential treatment of workers within the protected class. *Cf. Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1097 (1981) ("Title VII does not obligate an employer to accord . . . preference" to those within a protected class) (citing *Loeb v. Textron, Inc.*, 600 F.2d at 1012 n.6).

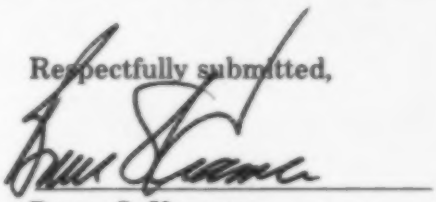
Givhan, Mt. Healthy, Loeb, Spagnuolo, Kephart, and *Womack* clearly suggest that even where a certain factor played a substantial part in or was the primary reason behind an employer's allegedly improper act, such a factor standing alone is insufficient to establish a violation of the plaintiff's rights. In light of the need for clear and understandable jury interrogatories and instructions that correctly summarize the law, *Smithers v. Bailar*, 629 F.2d at 897, this Court should consider the important issues presented in this case and end the use of misleading and incorrect jury instructions by the trial courts in ADEA cases.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals cannot be reconciled with those of the First, Fourth and Seventh Circuits. The trial court's use of the "factor which makes a difference" test distorts the true standard for imposing liability under the ADEA by lowering the threshold for a violation. Due to the significant impact this issue has on the outcome of all ADEA

cases, this Court should grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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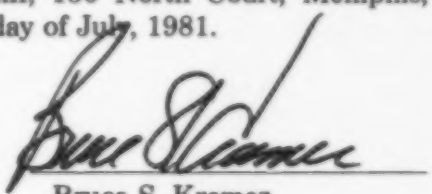
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been forwarded to C. Thomas Cates, Esq., and Charles G. Burr, Esq., Attorneys for Plaintiff, 130 North Court, Memphis, Tennessee 38103, this 21 day of July, 1981.



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APPENDIX

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ORDER

Filed April 24, 1981
No. 79-1531

Before: ENGEL, KENNEDY, and MARTIN, Circuit Judges.

Refined Metals Corporation appeals from a judgment for the plaintiff in this age discrimination case.

Luther Underhill began working with Memphis Lead Company in 1953 as a billing and scales clerk, handling various administrative duties. In 1973 Memphis Lead was purchased by the Dobbs family and Malcolm E. Ross, who had joined the company several years earlier as a production engineer. Ross became President of the new company, Memphis Smelting and Refining, Inc., and plaintiff Underhill was promoted to Vice President of Administration and Treasurer. In 1975, for reasons which were disputed by the parties to this case, Underhill was transferred to the position of Director of Personnel and Safety. On July 1, 1976, the assets of Memphis Smelting were purchased by ESB, Inc., which formed a new wholly-owned subsidiary called Refined Metals, the defendant in this action. Ross was hired as President and Chief Executive Officer of the new company.

During the transition in July of 1976 the plant was closed and cleaned, and all of the hourly employees were terminated. Ray Kenny, Vice President of ESB, Inc., requested that several of the salaried employees, including Underhill, remain with Refined Metals. Underhill agreed to do so and remained as Director of Personnel and Safety at the same salary.

Approximately six weeks later, on August 21, 1976, Underhill was notified of his termination from that position by Ross in a meeting in Ross' office. The parties disagree as to the reasons cited by Ross at the meeting and as to reasons for the dismissal generally. Refined Metals presented evidence that Underhill was generally incompetent in his earlier role as Vice President of Memphis Smelting and as Director of Personnel and Safety, particularly during the six-week start-up period in 1976 when

ESB, Inc. began operations. Underhill claims that Ross was under pressure from the new parent to build up a young organization. Underhill was offered and accepted the job of billing and scales clerk at a lower salary.

Underhill filed this action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et. seq.*, alleging that his removal as Director of Personnel and Safety constituted discrimination on the basis of age. The jury returned a verdict in favor of Underhill and awarded actual damages based on lost wages in the amount of $23,134.55. It further determined that the discriminatory actions had not been willful and declined to award liquidated damages. On Underhill's post-trial motion, the District Court ordered Refined Metals to reinstate Underhill to his former position, or to another position at the Memphis plant with comparable duties, responsibilities, and salary. The reinstatement order was stayed pending this appeal, upon the posting of bond by Refined Metals as ordered by the District Court.

Refined Metals contends that the District Judge improperly instructed the jury as to how it should resolve the liability issue if it found that there were "mixed motives" behind the demotion of Underhill. The relevant special interrogatory read as follows: "Was the age of plaintiff a factor and did it in fact make a difference in the decision not to retain plaintiff in his position as director of personnel and safety after August 21, 1976?" The District Judge explicitly noted in his order denying appellant's motion for a judgment notwithstanding the verdict that the interrogatory was based on the court's decision in *Laugesen v. Anaconda Company*, 510 F.2d 307 (6th Cir. 1975). Appellant claims that the special interrogatory failed to convey the applicable standard to the jury. Citing the First Circuit case *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), Refined Metals argues that the jury should have been instructed that in order for plaintiff to prevail, he had to prove by a preponderance of the evidence that his age was a "determining" factor in his discharge in the sense that "but for" the discriminatory motive,

he would not have been discharged. *See also Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299 (E.D. Mich. 1976).

We affirm the judgment of the District Court. We see no meaningful distinction between an instruction requiring age to be a "determining" factor and one which requires age to "make a difference." We express no view as to whether a "but for" standard of causation is appropriate because appellant failed to seek an instruction in the District Court.

Appellant also contends that the District Court erred in denying appellant's motions for a directed verdict and for a judgment notwithstanding the verdict. No motion for a new trial was made. Viewing the evidence in the light most favorable to appellee, we cannot conclude that reasonable minds could not differ as to the conclusions to be drawn. *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

Judgment Affirmed.

ENTERED BY ORDER OF
THE COURT

/s/
Clerk

ORDER OF EQUITABLE RELIEF IN THE FORM OF REINSTATEMENT AND ATTORNEY'S FEES AND ENTRY OF FINAL JUDGMENT

Filed September 13, 1979
No. C-77-2041

Plantiff brought this suit against his employer, Refined Metals Corporation, under the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (hereinafter "the Act"). On May 16, 1979, a jury verdict was returned in favor of the plaintiff on the issue of age discrimination under the Act. The jury awarded the plaintiff damages based on lost wages in the amount of $23,134.55.

Plaintiff has now moved the court for an order enjoining the defendant company to reinstate him to his former position as Director of Personnel and Safety, or to a comparable job position at a comparable salary, and for attorneys' fees in the amount of $12,000.00. In addition, plaintiff seeks lost wages from the date of entry of final judgment.

I. Reinstatement

Section 626(b) of the Act specifically provides that the court may compel reinstatement:

> In any action brought to enforce this chapter the Court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling . . . reinstatement . . . .

Plaintiff is still employed by defendant but seeks to be reinstated to his former position as Director of Personnel and Safety. Given our grant of discretion, we order that plaintiff, Luther Underhill, be reinstated to his former job position at his former salary of $25,000.00 per annum, or to another job position at the Memphis, Tennessee plant of Refined Metals Corporation with comparable duties, responsibilities and salary. There are no exceptional circumstances in this case which

would support a denial of reinstatement.

II. Attorneys' Fees

It is not disputed that plaintiff is entitled to recover reasonable attorneys' fees. The award of attorneys' fees is made in accordance with the factors set forth in *Cleverly v. Western Elec. Co., Inc.*, 450 F. Supp. 507, 511 (1978).

The parties have agreed that counsel for plaintiff expended the following number of hours in trial or in trial preparation:

C. Thomas Cates	62 hours
Charles G. Burr	85.6 hours

Cates' customary hourly rate for services of this nature is $60.00 per hour; Burr's customary hourly rate is $50.00 per hour. Considering the experience, reputation, and ability of counsel, these per hour rates are found to be reasonable. They produce a total minimum fee factor of $8000.00. Plaintiff seeks an additional $4000.00 in attorneys' fees based on a number of factors including the novelty and difficulty of the legal questions involved, the fact that a substantial contingency fee is involved, the result obtained, and awards granted in other cases. In consideration of these factors, the minimum fee factor of $8000.00 should be increased by addition of 10%, adding $800.00 to $8000.00, for a total allowable fee of $8,800.00.

III. Lost Wages from Date of Trial

Plaintiff is still employed by defendant but in a demoted capacity and at the reduced salary level. No judgment has yet

been entered on the jury verdict which awarded $23,134.55 based on lost wages up to the date of the trial, May 14, 1979.

Plaintiff seeks additional damages from the court based on wages lost from the time of the jury trial through the entry of final judgment in this cause. Given our grant of discretion in 29 U.S.C. § 626(b) and to effectuate the purposes of the Act, damages which reflect continuing lost wages shall be awarded. Victims of discrimination are entitled to be restored to the economic position they would have occupied but for the intervening unlawful conduct of employers. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976) (Title VII Standard). We therefore award an additional $3384.32, computed as follows:

Difference between present and past salaries	$ 423.04
Number of pay periods since trial date	X 8
Total	$3,384.32

IV. Conclusion

For the foregoing reasons, it is therefore

ORDERED that plaintiff be reinstated to his former job position as Director of Personnel and Safety, at his former salary of $25,000.00 per annum, or to another job position at the Memphis, Tennessee plant of Refined Metals Corporation with comparable duties, responsibilites and salary. It is further

ORDERED that plaintiff is hereby awarded an attorney's fee of $8,800.00 plus an additional $3,384.32 for wages lost since the date of trial.

The Clerk is directed to enter a final judgment of reinstatement and a final judgment of $35,318.87 against the defendant computed as follows:

Jury Award	$23,134.55
Attorneys' Fees	8,800.00
Additional Lost Wages	3,384.32
Total Judgement	$35,318.87

It is so ORDERED.

ENTER This 11 day of September, 1979.

/s/

CHIEF JUDGE

JUDGMENT ON JURY VERDICT

Filed April 24, 1981
No. C-77-2041

This action came on for trial before the Court and a jury, Honorable Parley Brown, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the Plaintiff.

It is Ordered and Adjudged the [sic] the Plaintiff be awarded a Judgment against the Defendant in the amount of $23,134.55 on the Jury Verdict.

In compliance with the order entered September 13, 1979, IT IS FURTHER ORDERED, that plaintiff be reinstated to his former job position as Director of Personnel and Safety, at his former salary of $25,000.00 per annum, or to another job position at the Memphis, Tennessee plant of Refined Metals Corporation with comparable duties, responsibilities and salary and that plaintiff be awarded attorneys' fees of $8,800.00 plus an additional $3,384.32 for wages lost since the date of trial, for a total monetary judgment in the amount of $35,318.87.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 9-14-79.

Dated at Memphis, Tennessee, this 14th day of September, 1979.

//s//
Clerk of Court

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Filed August 24, 1979
No. C-77-2041

On May 16, 1979, a jury verdict was returned in favor of the plaintiff on the issue of age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621 *et seq.* The jury determined plaintiff's damages based on lost wages in the amount of $23,134.55.

On August 2, 1979, defendant filed a motion for judgment notwithstanding the verdict on the grounds that the court improperly instructed the jury on the fact issue of age discrimination. At the conclusion of all the proof, defendant's counsel did move the court for a directed verdict, but the content of the court's instructions to the jury was not at issue at that stage of the proceedings. We agree with the plaintiff that this alleged error in the court's instructions does not form the proper basis of a motion for directed verdict, and consequently, is not a proper subject of a motion for judgment n.o.v. Instead, defendant's allegation of error should be framed in terms of a motion for new trial.

Irrespective of the form of defendant's motion, defendant's allegation of error is without merit. The Sixth Circuit Court of Appeals in *Laugesen v. Anaconda Company,* 510 F.2d 307 (6th Cir. 1975), formulated the legal standard by which the jury should be charged on the specific issue of age discrimination:

> However expressed, we believe it was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge him and that he was nevertheless entitled to recover if one such factor was his age and *if in fact it made a difference* in determining whether he was to be retained or discharged. (Emphasis supplied.)
>
> 510 F.2d at 317.

In the case at bar, this court referred to the *Laugesen* decision

specifically in drafting its relevant special interrogatory to the jury. Interrogatory No. 2 reads as follows:

> Was the age of plaintiff a factor and did it in fact make a difference in the decision not to retain plaintiff in his position as director of personnel and safety after August 21, 1976?

Certainly this interrogatory was adequate to convey to the jury the notion that, in order for the plaintiff to prevail, the jury would have to find that plaintiff's age was a factor which did in fact make a difference in the defendant's decision not to retain plaintiff in his position at that time.

Defendant now argues that the court should have instructed the jury that it could only return a verdict in favor of the plaintiff if the jury determined that plaintiff's age was a "determinative factor" in the defendant's decision not to retain plaintiff in his position at that time. As his authority, defendant has cited a recent decision in his favor from the First Circuit Court of Appeals, *Loeb v. Textron, Inc.*, Nos. 78-1340 and 78-1364 (1st Cir. June 21, 1979). In *Loeb*, the First Circuit adopted a stricter standard by which the jury should be instructed, but to the extent that any inconsistency exists between the standards formulated by the First Circuit in *Loeb* and by the Sixth Circuit in *Laugesen*, this court is bound by the latter.

For the foregoing reasons defendant's motion for judgment n.o.v. is denied.

It is so ORDERED.

ENTER this 24 day of August, 1979.

//s//

CHIEF JUDGE

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Filed August 2, 1979
No. C-77-2041

Comes now the defendant Refined Metals Corporation, and moves the Court to set aside the jury verdict heretofore returned and to enter judgment in favor of the defendant Refined Metals Corporation.

In support of its motion to set aside the jury verdict and for judgment nothwithstanding [sic] the verdict, the defendant would show:

1. Counsel for the defendant argued that the Court should instruct the jury that it could only return a verdict in favor of the plaintiff, Luther Underhill, if the jury determined as a matter of fact that the plaintiff's age was a "determinative factor" in the defendant's decision to reassign the plaintiff. In this regard, the defendant submitted its special instruction no. 5 as well as several other written special instructions and argued in open court that the special verdict form proposed by the court did not adequately or correctly state the law in that the special verdict form allowed the jury to return a verdict in favor of the plaintiff if the jury found that age was "in fact" a factor and "it made a difference."

2. At the conclusion of the plaintiff's case-in-chief and at the conclusion of all the proof, counsel for the defendant moved for the entry of a directed verdict in its behalf.

3. The Court of Appeals for the First Circuit in a case decided June 21, 1979, *Loeb v. Textron, Inc.*, _____ F.2d _____, 48 Law Week 2021, stated:

> The plaintiff's brief concedes that he was required to prove that age was the determining factor, but argues that this was conveyed by

instructing the jury that age had to have "made a difference." We agree with the employer, however, that the court's statement was inadequate to convey to the jury the legal standard it should follow. To find that age was a factor that affected the decision is not equivalent to finding that age was a determinative factor, yet proof that it was a determinative factor is, as both parties recognize, essential to recovery under the ADEA.

4. For the foregoing reasons, the defendant Refined Metals Corporation respectfully requests that the Court set aside the jury verdict in favor of Luther Underhill and grant the defendant Refined Metals Corporation a judgment notwithstanding the verdict dismissing the Complaint.

Respectfully submitted,

ROSENFIELD, BOROD,
BOGATION & KREMER, P.C.

By: /s/
Bruce S. Kramer

CHARGE OF THE COURT

Filed May 16, 1979
No. C-77-2041

Interrogatory No. 1: Was the defendant subject to the Age Discrimination Law on August 21st, 1976?

Interrogatory No. 2: Was the age of plaintiff a factor and did it, in fact, make a difference in the decision not to retain plaintiff in his position as director of personnel and safety after August 21, 1976?

Interrogatory No. 3: How much income has plaintiff lost as an employee of defendant since he was demoted on August 21, 1976?

Interrogatory No. 4: Did the defendant act wilfully when it considered plaintiff's age as a factor and allowed it, in fact, to make a difference in its decision to demote plaintiff on August 21, 1976?

REQUESTED JURY INSTRUCTION ON BEHALF OF REFINED METALS CORPORATION

Filed May 15, 1979
No. C-77-2041

INTENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Ladies and gentlemen of the jury, the Age Discrimination in Employment Act, 29 U.S.C. § 623(a) et seq., is designed to prohibit arbitrary discrimination in the work place based on age.

The Age Discrimination in Employment Act does not require the hiring of or continued employment of anyone regardless of age who is disqualified to do the work on grounds other than age. That is, ladies and gentlemen, the Age Discrimination in Employment Act does not require someone to hire someone merely because of his age, nor does it require that someone be continued in employment because of his age. What the law does is prohibit an employer from refusing to hire someone, or from demoting or firing them because of their age. In passing the law, Congress intended to insure that age is not a determining factor in making any decision regarding conditions of employment. Therefore, if you find that Luther Underhill was reassigned because of his age, you should find for the plaintiff, Luther Underhill. If you find that Luther Underhill was reassigned because of factors other than his age, you should find for the defendant, Refined Metals Corporation. That is, if you find that Luther Underhill was reassigned because he was unable to satisfactorily perform the job as Director of Safety and Personnel, then you should find for Refined Metals Corporation.

In making your determination you can properly look to see if there is an absence of a general pattern of discrimination based on age.

Ladies and gentlemen of the jury, you cannot substitute your judgment for that of the management of Refined Metals

Corporation as to what constitutes proper cause for the reassignment of Luther Underhill. That is, you may not agree with the business decisions made by Refined Metals Corporation. However, Refined Metals Corporation could not reassign Mr. Underhill on the basis of age because age is not considered a valid business reason except in situations not applicable to this case.

Source: *Langesan v. Anaconda Company,* 510 F.2d 307 (C.A. 6, 1975); *Lorillard v. Pons,* 46 U.S.L.W. 4150 (Feb. 22, 1978).

Instruction No. 5
Denied

/s/
UNITED STATES
DISTRICT JUDGE

*****

THE COURT: Yes -- "the word 'wilful' is used to characterize conduct marked by careless disregard as to whether one has the right so to act."

MR. CATES: Okay, sir.

THE COURT: Now, you have some suggestions here, Mr. Kramer, which we are going to deny, because they are all based on the premise that it is necessary for the court, for the jury to find that age was the sole reason for the failure to retain him in the job, and we have already disagreed with you on that. So we are turning down what I have numbered one, two and three on that ground. We are denying those on that ground, and we are going to give your [sic] what I am calling number four, which is your theory. I think you are entitled to have the court charge as to your theory.

Now, you have another one here -- you have a long one here.

MR. KRAMER: Your Honor, after you comment on those, could you pass those?

THE COURT: Do you want your one, two and three?

MR. KRAMER: Well, we don't have a copy of them here. Well, maybe it would be easier for us to come to the bench and look over them.

THE COURT: All right. You can do that.

MR. KRAMER: Your Honor, as to the burden of proof, I assume your Honor is going to give one substantially the same without the word "solely"?

THE COURT: Well, I am going to charge that the burden is on the plaintiff to prove that the answers to all these questions should be yes by the greater weight or preponderance of the evidence.

MR. KRAMER: I would ask that the court give both of these without the word "solely" in it (indicating).

We talked about the measure of damages is the difference between what he did earn and the minimum wage --

THE COURT: (Interposing) Well, I am not going to give either one or two as so amended or originally proposed.

MR. KRAMER: And, again, as amended, Number Three, I will ask that your Honor give it. That's just taking out the word "solely," because of his age.

THE COURT: All right. We will deny that as amended.

MR. CATES: Your Honor, on the one you have granted, right here --

MR. CATES: Right. On the point about it was considered an attempt to reassign so he would qualify for retirement benefits, there hasn't been one word said about that was the reason. There is no basis for that. There was not any proof about that.

MR. KRAMER: Mr. Ross testified on two occastions that they talked about --

THE COURT: (Interposing) Well, in any event, we will deny that, too. I am not sure there is a predicate for having in Number Four, and so I will deny it, too.

Now, this one here, this rather lengthy one that has in it "In passing the law, Congress intended to insure that age is not a determining factor in making any decision regarding conditions of employment." I believe that's a little stronger than what Congress called for, and so I can't give that.

I am going to give a charge to them that certainly while they can't discriminate because of age, at the same time he is not entitled to favorable treatment because of age. I am going to tell them that. So I will deny this one -- what is that, Five?

MR. KRAMER: Since your Honor has indicated that you are

going to deny them, I won't bother to read them.

THE COURT: Here is the language I am going to give them. I would say --

(Reading) "Members of the jury, it has been indicated to you that the plaintiff is basing his claim only on the Age Discrimination Law, and in this connection I charge you that this law is intended to apply only to age discrimination. Discrimination on any other basis, even if there was, would not be a violation of this particular law and would not be considered by you in connection with the plaintiff's claim. Moreover, I will say to you, as I am sure it is clear, that while the law prohibits discrimination on the basis of age, at the same time it does not create any preference because of age, and, therefore, plaintiff was not entitled to any preference whatsoever because of his age."

That's what I am going to give them.

MR. KRAMER: Your Honor, are you going to say something that the law does not, and this I think is contained right in the Act itself, that the Act does not prohibit a business from making a business decision if the decision is based on factors other than age?

THE COURT: Yes, I will say.

MR. CATES: And so long as age is not one of the factors.

THE COURT: That's what he said.

I will say the defendant may make a business decision with respect to plaintiff so long as it is not based on age.

LISTING OF PARENT COMPANIES AND AFFILIATES

Parent Companies of Petitioner Refined Metals Corporation are Exide Corporation and Exide Group, Inc. Affiliates of Refined Metals Corporation include Exide Management and Technology Corporation, E.S.B.-R.O.V. Export Corporation and Exide A.S.E.A., Inc.

Opposition

Office-Supreme Court, U.S.
FILED
SEP 11 1981
STEVAS,
CLERK

No. 81-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

REFINED METALS CORPORATION,
Petitioner,

v.

LUTHER C. UNDERHILL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OCTOBER TERM, 1981

REFINED METALS CORPORATION,
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v.

LUTHER C. UNDERHILL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Refined Metals seeks to have the Court review the concurring opinions of the District Court and the Court of Appeals on the basis of alleged errors in the District Court's treatment of two jury instructions, one of which was submitted to the jury over Refined Metals' objection at trial and the other of which was not submitted to the jury. The alleged error in the instruction that was submitted to the jury, however, is nothing more than semantic quibbling and was rejected summarily as such by both the District Court and the Court of Appeals. The second allegation of error concerns a jury instruction which was not requested by Refined Metals at the trial and on which the Court of Appeals consequently refused to state any view.

Refined Metals' petition argues that there is a conflict between various appellate circuits on the proper standard of causation under the Age Discrimination in Employment Act of 1967. Respondent does not agree that such a conflict actually exists. Nevertheless, even if a conflict has been manifested in other age discrimination cases, it has not been raised as a proper subject for appellate review in this case.

There are no special or important issues in this case that warrant review by the Court. The District Court drafted its jury instructions in the usual course, based specifically on the standard of causation in age discrimination cases as enunciated in the Sixth Circuit. That standard is proper and correct.

For the foregoing reasons, Respondent opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinions of the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit have not been reported officially, but are reproduced in the Appendix to Refined Metals' petition. (App.at A.1-A.9)

STATEMENT OF THE CASE

Prior to August 21, 1976, Luther C. Underhill was employed in the Memphis plant of Refined Metals as Director of Personnel and Safety. On that date, Mr. Underhill was demoted to the job position of Billing and Scale Clerk, at a substantial reduction in salary and job responsibilities. In response to the demotion, Mr. Underhill filed suit under the Age Discrimination in Employment Act of 1967.

The case was tried to a jury. At the conclusion of the proof, Refined Metals submitted several special requests for jury instructions, including Special Request No. 5, which sought an instruction to the effect that the jury should not find liability under the Act unless it determined that age was "a determining factor" in the adverse employment action taken against Mr. Underhill. (App. at A.15-A.16) The District Court declined to instruct the jury in accordance with Refined Metals' Special Request No. 5 because it believed that the intent of Congress in establishing the threshold for liability under the Act was conveyed adequately by Interrogatory No. 2, which was drafted by the District Court. Interrogatory No. 2 read as follows:

> "Was the age of plaintiff a factor and did it, in fact, make a difference in the decision not to retain plaintiff in his position as director of personnel and safety after August 21, 1976?"

Refined Metals did not make a timely request for a jury instruction that liability could be imposed under the Act only if the jury found that "but for" Refined Metals' discriminatory intent, Mr. Underhill would not have been demoted.

The jury answered Interrogatory No. 2 affirmatively and returned a verdict in favor of Mr. Underhill.

After the trial was concluded, Refined Metals attempted to introduce the "but for" causation issue into the proceedings, but did so even then by means of a technically incompetent motion. (App. at A.10-A.13) No motion for a new trial was filed on behalf of Refined Metals.

In addressing the identical issues raised in the instant petition, the United States Court of Appeals for the Sixth Circuit held that there is no meaningful distinction between an instruction requesting age to be "a determining factor," as Refined Metals had sought in its Special Request No. 5, and an instruction re-

quiring age to "make a difference," as the District Court formulated the causation standard in Interrogatory No. 2. Insofar as Refined Metals' appeal alleged error by the District Court in failing to give a jury instruction on the "but for" causation theory, the Sixth Circuit stated: "We express no view as to whether a 'but for' standard of causation is appropriate because appellant failed to seek an instruction in the District Court." (App. at A.4)

REASONS FOR DENYING THE WRIT

In its petition, Refined Metals argues that the traditional requirement for establishing causation under the Age Discrimination in Employment Act of 1967, i.e., that age be proven to be a "determining" or "determinative" or "proximate" cause of the adverse employment action, e.g., *Greller* v. *Markham*, 635 F.2d 1027 (2d Cir. 1980); *Kentroti* v. *Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1978); *Laugesen* v. *Anaconda Company*, 510 F.2d 307 (6th Cir. 1975), *cert. denied* 422 U.S. 1045, 95 S.Ct. 2665, 45 L.Ed.2d 697 (1975), has been rejected and supplanted by a stricter standard of causation, i.e. a "but for" test, as set forth in cases such as *Loeb* v. *Textron, Inc.* 600 F.2d 1003 (1st Cir. 1979) and *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981).

There are, however, fundamental fallacies in petitioner's argument.

First, the various formulations of the standard of causation under the Act by the federal appellate circuits are not "decision[s] in conflict with the decision of another court of appeals on the same matter," as contemplated by Rule 19(b) of the Rules of the Supreme Court of the United States. It is correct that there have been varied enunciations of the standard by different courts of appeals, using varied word combinations. Several recent district court opinions have recognized the varied enunciations of the standard. See, e.g., *Olsen* v. *Southern Pacific Transportation Co.*, 480 F.Supp. 773, 779 (N.D. Cal. 1979) ("The articulation of the controlling standard of proof has generated a certain amount of semantic confusion."); *Carolan* v. *Central Freight Lines, Inc.*, 489 F.Supp. 941, 944 (E.D.Tex. 1980) ("The Court recognizes that there may be a slight inconsistency between the different formulations devised and adopted by the Circuits.") However, no federal court has suggested that the varied articulations of the standard cannot be reconciled with one another or with the accepted tort principle that there can be more than one proximate cause for a given tortious act.

Second, even assuming *arguendo* that a direct conflict exists between the standards of causation as formulated by different federal appellate circuits, such a conflict has not been raised as a proper subject for appellate review in this case. The issue theorectically might have been preserved for appellate review in this case if Refined Metals had requested a jury instruction on a "but for" standard of causation, but it did not. Nor did it file a motion for a new trial on that ground. Consequently, the Sixth Circuit was foreclosed from considering the issue in Refined Metals' appeal because a party cannot complain of a court's failure to give an instruction not requested. *Fisher* v. *Indiana Lumbermens Mutual Ins. Co.*, 456 F.2d 1396 (5th Cir. 1972); *Dallas Ry. & Terminal Co.* v. *Sullivan*, 108 F.2d 581 (5th Cir. 1940); *Campbell* v. *Clark*, 283 F.2d 766 (10th Cir. 1960). For that same reason, the purported conflict raised in Refined Metals' petition is not ripe for review by the Court.

Refined Metals, in footnote 5 to its petition, seeks to excuse its failure to request the desired jury instruction by citing two cases, *St. Paul Fire & Marine Ins. Co.* v. *Bachmann*, 285 U.S. 112, 72 S.Ct. 482, 76 L.Ed. 648 (1931) and *Gradsky* v. *Sperry Rand Corp.*, 489 F.2d 502 (6th Cir. 1973). Neither of these two cases, however, supports the proposition for which it was cited. *Gradsky* deals with the issue of whether a parties' objection under Rule 51 of the Federal Rules of Civil Procedure to a proposed jury instruction must be formally stated in the pleadings. That has never been an issue in the instant case. *Bachmann* held that a parties' failure to request a correct jury instruction does not cure a court's error in giving a jury instruction based on an obvious misinterpretation of a provision in a contract between the parties. Again, no such issue is present in this case.

Finally, Refined Metals' petition seeks to have the Court review this case on the basis of an alleged error by the District Court in instructing the jury that age must be proven by the plaintiff to be "a factor... [which] in fact, made a difference," as opposed to "a determining factor." The United States Court

of Appeals for the Sixth Circuit found "no meaningful distinction" between these two formulations of the appropriate standard. Refined Metals has never offered any explanation of the purported distinction. Logic suggests that there is none. In any event, the Sixth Circuit should be allowed a full measure of deference in deciding which particular jury instructions are consistent with its view of the appropriate standard.

CONCLUSION

Refined Metals seeks to have the Court review this case on the basis that the District Court should have instructed the jury that, in order for Mr. Underhill to establish liability under the Act, he must prove that age was "a determining factor" in the adverse employment action. The District Court, however, did so instruct the jury, albeit in somewhat different terms. There is no meaningful distinction, either legally or semantically, between the jury instruction requested by Refined Metals and the one actually given by the District Court.

Refined Metals also seeks review by the Court on the basis of an alleged conflict between the courts of appeals on the applicable standard for establishing liability under the Act. Respondent does not agree that such a conflict exists. Nevertheless, even if such a conflict does exist, it would have been necessary for Refined Metals to seek a jury instruction concerning the "but for" standard of causation in order for the conflict to arise within the context of this case. Refined Metals did not request such a jury instruction at trial. Consequently, the alleged conflict has not been raised as a proper subject for appellate review in this case.

There are no important questions of federal law or other issues which would make this case appropriate for review by the Court. Certiorari, therefore, should be denied.

Respectfully submitted,

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